

NO. ~~81480-5~~

81478-3

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SUPREME COURT OF THE STATE OF WASHINGTON

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ENVER MEŠTROVAC,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES  
and  
BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondents.

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RESPONDENT  
BOARD OF INDUSTRIAL INSURANCE APPEALS'  
RESPONSE TO WASHINGTON STATE TRIAL LAWYERS  
ASSOCIATION FOUNDATION'S AMICUS CURIAE  
MEMORANDUM SUPPORTING REVIEW

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ROBERT M. MCKENNA  
Attorney General

JOHNNA S. CRAIG  
WSBA No. 35559  
Assistant Attorney General  
SPENCER W. DANIELS  
WSBA No. 6831  
Assistant Attorney General  
PO Box 40108  
Olympia, WA 98504-0108  
(360) 586-3457

FILED  
AUG - 1 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2008 AUG - 1 P 3: 30

BY RONALD E. CARPENTER

CLERK

## **I. IDENTITY OF RESPONDING PARTY**

This Response is filed by Respondent, Board of Industrial Insurance Appeals (Board). The Board is a quasi-adjudicative agency that does not normally participate in appellate review of Board matters. In this case, the Board appealed a superior court order that awarded monetary relief against the Board to a worker's compensation claimant, and subsequently refused the Board's request for intervention and reconsideration. *Enver Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 176 P.3d 536 (2008), *review pending*. The Board responds to the WSTLA Foundation brief because the amicus suggests a remedy against the Board itself—monetary reimbursement for translation services.

## **II. WSTLA FOUNDATION DOES NOT SHOW GROUNDS FOR REVIEW**

WSTLA Foundation argues that Mr. Meštrovac's petition involves two issues of substantial public interest that warrant review by this Court under RAP 13.4(b)(4): (1) If a Limited English Proficiency (LEP) claimant is denied interpreter services in violation of chapter 2.43 RCW and incurs expenses in obtaining interpreter services, is the LEP claimant entitled to reimbursement? (2) If the LEP claimant is entitled to reimbursement, which agency—Department of Labor & Industries (Department) or the Board—is responsible for the reimbursement?

WSTLA Foundation does not argue that Mr. Meštrovac's petition meets any of the other criteria in RAP 13.4(b).

WSTLA Foundation focuses on the Court of Appeals' holding that the Board-appointed interpreter should have interpreted attorney-client communications during the legal proceeding. WSTLA Foundation largely ignores the Court of Appeals' ruling that under chapter 2.43 RCW the Board was not required to pay for Mr. Meštrovac's interpreter services at any phase of the proceeding. *Meštrovac*, 142 Wn. App. at 709, n.21. It is this latter ruling that precluded reimbursement and confirms that this case does not present the issues argued by WSTLA Foundation.

**A. Mr. Meštrovac's Arguments About Reimbursement for Providing His Own Interpreter Services Is Not a Significant Issue Requiring Review by This Court**

WSTLA Foundation argues that because the Court of Appeals held that the Board should have allowed the interpreter appointed by the Board to interpret private, off-the-record attorney-client communication between Mr. Meštrovac and his attorney during the hearing, this Court should review whether Mr. Meštrovac was wrongly denied reimbursement for costs he may have incurred in providing his own interpreter and whether he should be reimbursed by the Board or the Department.<sup>1</sup>

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<sup>1</sup> Mr. Meštrovac did not offer proof to the Board or lower courts regarding costs incurred during the hearing for interpreting such conversations. He has, instead, asked for remand to have the Board determine what costs were incurred. Accordingly, there is

**1. WSTLA Foundation Misunderstands the Court of Appeals' Ruling**

WSTLA Foundation relies on a mistaken description of the Court of Appeals' holding regarding chapter 2.43 RCW and why reimbursement was denied. WSTLA Foundation states that:

In this case, the Court of Appeals states . . . that there is no basis for recovering these additional financial costs under Ch. 2.43 RCW when the interpreter services involved did not have an impact on the outcome of the underlying claim.

Brief of Amicus, WSTLA Foundation, at page 5.

The Court of Appeals' discussion of prejudice on the outcome, however, related to the due process and equal protection claims of the claimant, not the claims raised under chapter 2.43 RCW. *Meštrovac*, 142 Wn. App. at 707. To decide if Mr. Meštrovac was entitled to relief, the Court of Appeals had to evaluate whether the outcome would have likely been different with the proper interpreter services. *Id.* Ultimately, the Court held that it would not likely have been different and that conclusion has not been disputed. *Id.*

In footnote 21, however, the Court further explained why the broad *reimbursement remedies* ordered by the superior court were reversed. It was not, as WSTLA asserts, because the worker failed to show prejudice.

The Court explained that it was because the Board has no obligation to

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some question whether this case actually involves any genuine dispute, because the record contains only broad assertions that he should be reimbursed for interpreters.

pay for such services. *Meštrovac*, 142 Wn. App. at 709, n.21 (“[W]e also hold, as we did in *Kustura*, that the statute does not require the Board to pay for such services because it did not initiate the proceedings.”).<sup>2</sup> See *Kustura v. Dep’t of Labor & Indus.*, 142 Wn. App. 655, 680, 175 P.3d 1117 (2008), review pending (analyzing chapter 2.43 RCW and holding that the Board was required to appoint an interpreter but was not required to pay for an interpreter except upon a showing of indigency).<sup>3</sup>

By overlooking the Court of Appeals’ express reasoning, WSTLA Foundation incorrectly claims that this case involves denial of reimbursement to a worker based on the worker failing to show prejudice from the denial of interpreter services. While the Court of Appeals did deny relief on the merits because the worker showed no prejudicial error, it denied reimbursement because this worker had no statutory right to have the Board pay for interpreter services.

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<sup>2</sup> Specifically, RCW 2.43.040(2) provides:

In all legal proceedings in which the non-English-speaking person is a party . . . or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner’s inquests, mental health commitment proceedings, and other *legal proceedings initiated by agencies of government, the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.*

(Emphasis added.)

<sup>3</sup> The Board is not a party in *Kustura*, and therefore will not be responding to WSTLA Foundation’s amicus in that matter.

**2. Interpreter Services Are Not Imperiled by Denial of Reimbursement**

Nor can WSTLA Foundation say that the Court should review this case because interpreter services are somehow in peril. By rule, the Board voluntarily incurs the costs of interpreter services during hearings. Under WAC 263-12-097, the Board appoints and pays for interpreter services. The Court of Appeals adjusted the scope of how the Board should manage its interpreter, holding that it should not prevent the interpreter from interpreting whenever necessary to assist the claimant during the hearing. *Kustura*, 142 Wn. App. at 681. Thus, the public interest in providing interpreter services at Board hearings is well established by statute and by rule.

**3. WSTLA Foundation Does Not Show Reason to Review the Conclusion That Neither the Board nor Department “Initiated” Mr. Meštrovac’s Appeal to the Board**

Determining whether a governing body initiates the legal proceeding is the first step in determining whether Mr. Meštrovac was entitled to paid interpreter services.<sup>4</sup> Because neither the Department nor the Board initiated the proceeding, Mr. Meštrovac is required to pay his own interpreter expenses. WSTLA Foundation offers no good reason why this Court need review this ruling.

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<sup>4</sup> RCW 2.43.040(2).

RCW 2.43.040(3) states:

*In other legal proceedings, the cost of providing the interpreter shall be borne by the non-English-speaking person unless such person is indigent according to adopted standards of the body. In such a case the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted.*

(Emphasis added.)

The Court of Appeals correctly held that in an appeal filed to the Board by a worker's compensation claimant, it is the claimant, not the Board or the Department, that initiates the legal proceeding. *Meštrovac*, 142 Wn. App. at 709, n.21. In light of this straightforward statutory assignment of costs, there is no "matter of substantial public interest" as WSTLA Foundation alleges.

To dispute this straightforward application of chapter 2.43 RCW, WSTLA Foundation cites to its lower court briefing about what is a legal proceeding and who initiates the Board proceeding. The Department of Labor & Industries is filing a response to WSTLA Foundation that addresses this point. Accordingly, the Board will not brief this point further.<sup>5</sup>

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<sup>5</sup> In addition, determining the meaning of "legal proceeding" in RCW 2.43.040(2) does not rise to the level of "substantial public interest" under RAP 13.4(b)(4). There is no dispute that the Board's proceeding is a legal proceeding. However, under the statute, the issue of who pays for the interpreter is dependent on whether the legal proceedings are initiated by a public agency, which these were not.

**B. Because Mr. Meštrovac Could Have Avoided Any Need for Reimbursement Under RCW 2.43.040, This Is Not an Appropriate Case for Supreme Court Review**

Review by this Court of Mr. Meštrovac's case is unnecessary for yet another reason. There is no provision in chapter 2.43 RCW that would allow for reimbursement of expenses when interpreter services are not properly provided. Mr. Meštrovac's remedy is not reimbursement after the fact. Rather, he could have sought a writ of mandamus from the superior court to compel the Board to provide the necessary interpreter services during the Board proceedings had he chosen to do so. *See Meštrovac*, 142 Wn. App. at 706 (citing *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 752 P.2d 1357 (1988)).

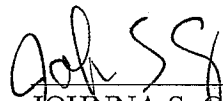
In the context of whether the Board was providing the proper level of interpreter services, there is no reason Mr. Meštrovac could not have sought a writ of mandamus to compel the Board to provide the level of interpreter services he felt he was entitled to under chapter 2.43 RCW. Had Mr. Meštrovac done this, he would not have incurred any expense for interpreter services. Where an individual petitioner had legal recourse to avoid incurring any costs, his unique reimbursement claim cannot rise to the level of a "substantial public interest" warranting review by this Court.

### III. CONCLUSION

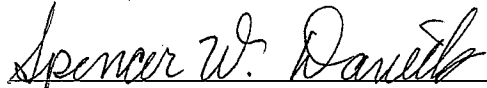
Because neither Mr. Meštrovac nor WSTLA Foundation has shown that the criteria set forth in RAP 13.4(b) are met, this Court should deny review.

DATED this 1st day of August, 2008.

ROBERT M. MCKENNA  
Attorney General



JOHNNA S. CRAIG  
WSBA No. 35559  
Assistant Attorney General



SPENCER W. DANIELS  
WSBA No. 6831  
Assistant Attorney General

Attorneys for Board of Industrial  
Insurance Appeals